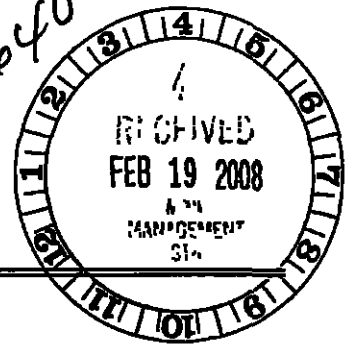


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BEFORE THE
SURFACE TRANSPORTATION BOARD



ENTERGY ARKANSAS, INC. and
ENTERGY SERVICES, INC., Complainants

v.

UNION PACIFIC RAILROAD
COMPANY and MISSOURI &
NORTHERN ARKANSAS RAILROAD
COMPANY, INC., Defendants.

Docket No. 42104

ENTERED
Office of Proceedings

FEB 19 2008

Part of
Public Record

MISSOURI & NORTHERN ARKANSAS
R.R. – LEASE, ACQUISITION AND
OPERATION EXEMPTION – MISSOURI
PACIFIC R.R. and BURLINGTON
NORTHERN R.R.

Finance Docket No. 32187

VERIFIED COMPLAINT OR IN THE ALTERNATIVE
PETITION TO REVOKE IN PART

**REDACTED, PUBLIC VERSION – CONFIDENTIAL INFORMATION
HAS BEEN DELETED**

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Dated. February 19, 2008

Attorneys & Practitioners

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERGY ARKANSAS, INC. and ENTERGY SERVICES, INC., Complainants)	
v.)	Docket No. 42104
UNION PACIFIC RAILROAD COMPANY and MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC., Defendants.)	
MISSOURI & NORTHERN ARKANSAS R.R. – LEASE, ACQUISITION AND OPERATION EXEMPTION – MISSOURI PACIFIC R.R. and BURLINGTON NORTHERN R.R.)	Finance Docket No. 32187

**VERIFIED COMPLAINT OR IN THE ALTERNATIVE
PETITION TO REVOKE IN PART**

COME NOW Entergy Arkansas, Inc. ("EAI") and Entergy Services, Inc. ("ESI") (collectively, "Entergy") and file this Verified Complaint, under 49 U.S.C. §§ 10702, 10704, and 11701, seeking a determination from the Board that the continued enforcement of certain provisions of a 1992 lease agreement between Defendant Union Pacific Railroad Company ("UP") and Defendant, the Missouri & Northern Arkansas Railroad Company, Inc. ("M&NA") constitutes an unreasonable practice. As demonstrated below, certain provisions of the lease operate as a "paper barrier" preventing M&NA from interchanging Entergy's coal traffic with a rail carrier other than UP. The continued enforcement of these provisions constitutes an

unreasonable practice in violation of Title 49 and is otherwise against the public interest and in violation of public policy.

In the alternative, Entergy hereby petitions under 49 U.S.C. § 10502(d) that the Board revoke, in part, the exemption noticed in *Missouri & Northern Arkansas R.R. – Lease, Acquisition and Operation Exemption – Missouri Pacific R R and Burlington Northern R R*, ICC Finance Docket No. 32187 (ICC served Dec 22, 1992). Specifically, Entergy requests that the Board revoke the exemption to the extent that it permits UP to enforce the paper barrier provisions of the lease restricting the interchange of Entergy's traffic. Revocation of the exemption to this extent is necessary because application of Title 49 is necessary to carry out the transportation policy set forth in 49 U.S.C. § 10101.

Finally, and further in the alternative, Entergy requests that the Board find that the subject lease constitutes a pooling and/or traffic division arrangement as to which agency authorization under Title 49 was not properly obtained. *See* 49 U.S.C. § 11322; *see former* 49 U.S.C. § 11342.

In support hercof, Entergy states as follows:

I. Complainant EAI is a corporation organized under the laws of the State of Arkansas, with its principal place of business located at 425 West Capitol Avenue, Little Rock, Arkansas 72201. EAI is a wholly owned subsidiary of Entergy Corporation, an investor-owned public utility holding company organized and existing under the laws of Delaware and registered pursuant to the Public Utility Holding Company Act of 1935. EAI produces, distributes and sells electric power at retail to approximately 667,000 residential, commercial, industrial and agricultural customers located in 63 counties in Arkansas, and engages in wholesale power transactions as well.

2. Complainant ESI is a wholly owned subsidiary of Entergy Corporation. ESI is a corporation organized and existing under the laws of the State of Delaware, and having its principal place of business at 639 Loyola Avenue, New Orleans, Louisiana 70113. ESI acts as an agent for Entergy Corporation's public utility operating subsidiaries, including EAI, and is responsible for, among other things, acquiring fuel and related transportation for coal-fired power plants operated by its electric utility affiliates.

3. EAI operates, *inter alia*, a coal-fired power plant located near Newark, Arkansas known as the Independence Steam Electric Station. The Independence Station was designed to burn low-sulfur southern Powder River Basin ("PRB") coal. In generating electric power, EAI burns approximately 6.5 million tons of coal annually at Independence. Since the 1983 commencement of operations at Independence, all PRB coal burned at the plant has been delivered by railroad.

4. Defendant UP is a Delaware corporation with its principal place of business located at 1400 Douglas St., Omaha, Nebraska 68179. UP is a rail carrier subject to the jurisdiction of the Board under Title 49.

5. Defendant M&NA is a Kansas corporation with its corporate headquarters at 5300 Broken Sound Blvd., NW, Boca Raton, Florida 33487, and a business address of 514 N. Ormer, Carthage, Missouri 64836. M&NA is a wholly owned subsidiary of RailAmerica, Inc., a noncarrier holding company with forty-one (41) railroad operating subsidiaries. M&NA is a rail carrier subject to the jurisdiction of the Board under Title 49.

6. BNSF Railway Company ("BNSF") is a Delaware corporation with its corporate headquarters located at 2650 Lou Menk Drive, Fort Worth, Texas 76161. BNSF is the

corporate successor to Burlington Northern Railroad Company, which was a party to the notice of exemption at issue in Finance Docket No. 32187 insofar as that notice pertained to trackage rights over two Burlington Northern lines in the State of Missouri.

7. On December 4, 1992, M&NA filed a notice of exemption invoking authority to lease, acquire and operate from UP's predecessor in interest, Missouri Pacific Railroad Company ("Missouri Pacific"), 492.27 miles of rail line in the States of Arkansas, Kansas, and Missouri, and to acquire 60.33 miles of incidental trackage rights over Missouri Pacific and Burlington Northern Railroad Company lines in the States of Missouri and Arkansas *Missouri & Northern Arkansas R R – Lease, Acquisition and Operation Exemption – Missouri Pacific R R. and Burlington Northern R.R.*, ICC Finance Docket No. 32187 (ICC served Dec. 22, 1992) (notice of exemption).

8. Concurrent with the filing of M&NA's notice of exemption regarding the lease of the Missouri Pacific lines, M&NA's then-current parent company, RailTex, Inc. ("RailTex") filed a notice of exemption to continue in control of M&NA when the latter became a rail carrier. *See RailTex, Inc. – Continuance in Control Exemption – Missouri & Northern Arkansas R.R.*, ICC Finance Docket No. 32188 (ICC served Dec. 22, 1992) (notice of continuance in control exemption). This filing was required because, at the time, RailTex controlled ten other Class III railroads operating in thirteen states. *Id.*

9. On December 11, 1992, M&NA and Missouri Pacific executed their lease (the "UP/M&NA Lease"). *See* Exhibit No. 1 hereto. Section 3.01 of the Lease provides, in part, that "... Lessee shall be entitled to full and exclusive use of the Leased Premises for the operation of common carrier rail freight service, including the right to access and interchange

traffic directly with all present and future railroads at Springfield, Joplin, Carthage, Lamar, Aurora and Nevada, MO and Ft. Scott, KS.” UP/M&NA Lease at § 3 01.

10. The term of the lease is twenty years from the “Commencement Date” of service. Approximately fifteen years of the term are now expired. M&NA has an option to extend the term of the lease three times for an extended term of up to twenty years for each extension. See UP/M&NA Lease at § 2.02.

11. Section 4.01 of the UP/M&NA Lease establishes a “paper barrier” through an annual rent schedule that varies with the percentage of annual traffic that M&NA interchanges with carriers other than UP:

SECTION 4.01 – In consideration of this Lease, and subject to the terms and provisions set forth herein, Lessee agrees to pay Lessor rent for the Leased Premises in the amount of Ninety Million Dollars (\$90,000,000) per year payable annually in advance on the 1st day of March; PROVIDED, HOWEVER, that subject to the provisions of Section 4.02 hereof, for each lease year that 95% or more of all traffic originating or terminating on the Leased Premises is interchanged with Union Pacific Railroad Company or Missouri Pacific Railroad Company and any affiliated company, their successors and assigns, Lessor agrees that it will waive or partially waive the rent for that particular year in accordance with the schedule set forth in Section 4.03. . . .

SECTION 4.03 – Upon request of Lessor, on or before the 1st day of February of each year following the commencement of this Lease, Lessee shall submit a report, signed by an officer of Lessee, certifying the amount and type of traffic originating or terminating on the Leased Premises during the prior calendar year, the railroads (if any) with which all or portions of such traffic were interchanged, the volume of traffic interchanged with each such railroad, and the total amount of rent due and payable for the previous calendar year. The rent due from Lessee for the Year shall be determined by reference to the percentage of the total traffic (as described in Section 4.01, subject to the provisions of Section 4.02) that was interchanged with Lessor, subject to the terms of Section 4.04, in accordance with the following schedule:

**PERCENTAGE OF THE TOTAL
TRAFFIC THAT WAS INTER-
CHANGED WITH LESSOR RENT DUE LESSOR**

100 - 95%	\$ - 0 -
94 - 85%	\$10,000,000
84 - 75%	\$20,000,000
74 - 65%	\$20,000,000
64 - 55%	\$30,000,000
54 - 45%	\$40,000,000
44 - 35%	\$50,000,000
34 - 25%	\$60,000,000
24 - 15%	\$70,000,000
14 - 5%	\$80,000,000
0 - 4%	\$90,000,000

12. These rental amounts are subject to escalation each year in accordance with the "Producer Price Index – Finished Goods (Reference Base 1982 = 100)," pursuant to Section 4.04 of the Lease. That section adjusts the annual rent obligations based upon the annual change in the PPI Index from December 1992 to the PPI Index figure for December of the then-current year. As of December of 2007, the maximum annual rental amount under the Lease stood at \$114 million.¹

13. In addition to its restrictive provisions regarding rent, the UP/M&NA Lease includes three other provisions that ensure that in the aggregate the Lease's paper barriers will serve to prevent interchange by M&NA of Entergy's PRB coal traffic with any carrier other than UP.

14. First, the UP/M&NA Lease gives UP the right to prohibit M&NA from serving the Independence Plant and to provide exclusive service itself, on seven days' notice. See Section 3.01 ("During the term hereof, Lessor shall not have the right to operate trains over

¹ The December 2007 PPI index level was 170.6. The index level had been 135.2 as of December 1992 (\$90 million x (170.6/135.2) = \$114 million)

the Leased Premises, except that Lessor may obtain trackage rights between Diaz Junction and Independence, AR, after giving seven days' written notice to Lessee to serve, on an exclusive basis, the Arkansas Power and Light Company (AP&L) plant located at Independence, AR, either at AP&L's request or at Lessor's sole discretion."); *see also* Section 3.04 ("Lessor may acquire the right to operate over the Leased Premises between milepost 259.05 at Diaz Junction and milepost 270.00 near Independence to serve AP&L and, if this right is exercised, Lessee shall no longer have the right to serve AP&L, and AP&L shall become a closed industry served only by Lessor ") In order to exercise its right to provide exclusive trackage rights service to Independence, UP must pay \$60,000 per year ² Through these provisions, UP has unlimited discretion to prevent M&NA from providing any service to Independence, thus further reinforcing the strength of UP's paper barrier.

15. The second portion of the UP/M&NA Lease that reinforces the paper barrier relates to a restriction on the availability of trackage rights between Pleasant Hill and Kansas City, Missouri. Under Section 5.05 of the Lease, M&NA's use of these trackage rights – which are necessary to interchange traffic with BNSF in Kansas City – are limited to M&NA's use for interchanging traffic with UP. *See* Section 5.05 ("Lessor and Lessee shall execute trackage rights agreements between Kansas City (Neff Yard) and Pleasant Hill, MO and between Diaz Junction and Newport, AR (Lessee over Lessor's tracks) solely for the purpose of interchange with Lessor."). Again, this provision allows UP to prevent interchange between

² There is a striking disparity between UP's obligation to pay \$60,000 per year to M&NA if UP elects to provide exclusive service to Independence and M&NA's obligation to pay rent of up to \$14,000,000 per year if it interchanges 96-100% of its traffic with a carrier other than UP. For purposes of comparison, the maximum annual rental obligation is fifteen hundred (1,500) times higher than UP's potential trackage rights fee. The disparity between these figures remains substantial even if adjusted for diversions of 95% or less of M&NA's annual traffic, or if adjusted to reflect the short distance of the UP's trackage rights to serve Independence.

M&NA and BNSF or other carriers (*e g* , CP-DM&E) at Kansas City, and thus, reinforces the paper barrier restriction on the Independence traffic.

16. Finally, Section 15.01 of the UP/M&NA Lease allows termination of the Lease itself if a court or other body determines that the rental provisions are unlawful or otherwise improper. *See* Section 15.01(f) (“This Lease may be terminated as follows: . . . (f) By Lessor or Lessee, by giving 30 days’ written notice to the other party, in the event a court or other body determines that all or any of the provisions of Section IV are unlawful or otherwise unenforceable.”) This provision seeks to insulate UP from the risk that the other contract terms designed to prevent any competitive rail service for the Independence Plant would be found to be unlawful, a possibility that the drafters of the Lease obviously recognized as a significant concern when preparing the agreement.

17. Entergy first learned that the terms of M&NA’s lease with UP prevented M&NA from transporting coal that was received in interchange from Burlington Northern Railroad to the Independence Station in approximately 1994. In the wake of the serious floods that hit the Midwest in 1993, service from UP deteriorated badly and Entergy’s coal stockpiles were dwindling. In an effort to obtain some relief from UP’s failure to transport needed coal volumes to restore Entergy’s inventories, Entergy approached M&NA about the possibility of bringing in PRB coal that would be interchanged from Burlington Northern. Though an M&NA representative initially expressed interest in this possibility, after investigating the matter, he reported that M&NA’s agreements with UP would not permit M&NA to handle the Independence traffic in interchange with Burlington Northern. Entergy did not learn until later about the details of UP’s stranglehold on its traffic.

18. Entergy also attempted to obtain M&NA's assistance during the UP service crisis in 1997-1998. In late 1997, Entergy approached UP and sought UP's agreement to waive the restrictions on interchange in the UP/M&NA Lease. UP did not agree to do so

19. UP currently provides rail service to Entergy's Independence Station (and its White Bluff Station) under the terms of a confidential rail transportation contract. *See* Exhibit No. 2 hereto (filed under seal). This contract is scheduled to expire on { [REDACTED] } and obligates Entergy to tender { [REDACTED]

[REDACTED]}. Entergy seeks to have the paper barriers in the UP/M&NA lease set aside in this proceeding in order to be able to pursue the possibility of PRB coal transportation service from BNSF and M&NA in addition to UP in the interest of both competitive pricing and reliable transportation service.

20. Under the restrictions imposed by the paper barrier, Entergy receives service for PRB coal deliveries to Independence via a circuitous routing that involves UP moving loaded coal trains from the PRB through North Little Rock to Diaz Junction, Arkansas, then via M&NA from Diaz Junction to the plant (a distance of approximately eight miles). M&NA delivers empty coal trains from Independence back to UP at either Diaz Junction or Kansas City, Missouri. A diagram showing the routes over which Entergy's loaded and empty trains move between the PRB and the Independence Station is contained in Exhibit No. 3 hereto.

21. M&NA currently maintains interchanges with UP, BNSF (at Aurora, MO, Springfield, MO, and Lamar, MO). and Kansas City Southern Railway Company (at Joplin,

MO). In the absence of the paper barrier restrictions in the UP/M&NA Lease, coal transportation service could be provided from the PRB to Independence via BNSF-M&NA with an interchange between the carriers at either Aurora, Missouri, or Kansas City, Missouri using M&NA's trackage rights over UP between Pleasant Hill and Kansas City, Missouri. The handling of loaded coal trains over the M&NA line over either of these routes may require some upgrading. Entergy is aware of no reason to believe that there are any significant operational impediments to bringing the line up to a condition suitable for handling its loaded coal trains.

22. Although somewhat more circuitous than a BNSF-M&NA routing via Kansas City, PRB coal transportation service also could be provided to Independence (in the absence of the paper barrier restrictions) via BNSF-M&NA with an interchange between the carriers at Fort Scott, Kansas, which is an interchange point referenced in the UP/M&NA Lease. *See* UP/M&NA Lease at Section 3.01. Although Entergy understands that M&NA has removed some connecting track associated with its interchange with BNSF at Fort Scott, Kansas, upon information and belief, this interchange track could be restored without significant difficulties.

23. By decision served October 30, 2007 jointly in STB Ex Parte No 575, *Review of Rail Access and Competition Issues – Renewed Petition of Western Coal Traffic League*, and STB Ex Parte No. 575 (Sub-No. 1) *Disclosure of Rail Interchange Commitments*, (“Paper Barriers Decision”), the STB confirmed that it will consider complaints alleging that the continued enforcement of a pre-existing paper barrier constitutes an unreasonable practice, and that the STB will not allow the existence of the Railroad Industry Agreement (“RIA”) to act as an impediment to such a complaint. *Ex Parte No. 575, Review of Rail Access and Competition Issues – Renewed Petition of Western Coal Traffic League*, at 15.

24. Moreover, the STB stated that it will consider the reasonableness of interchange commitments on an individual, case-by-case basis, and that the factors that it will consider in assessing the reasonableness of a challenged paper barrier include, *inter alia*: (i) the nature of the paper barrier itself (*i.e.*, whether the paper barrier amounts to a complete ban on interchange); (ii) the duration of the paper barrier (*i.e.*, whether it is subject to a sunset provision); (iii) the competitive conditions; and (iv) the effects of the paper barrier. *Id.*

25. There is no sunset provision regarding any of the paper barrier restrictions in the UP/M&NA Lease, and collectively, those provisions effectively operate as a ban on interchange of coal traffic for the Independence Station between M&NA and a rail carrier other than UP.

26. On information and belief, UP has obtained significant net financial benefits through the UP/M&NA Lease in the more than fifteen years since its inception, in the form of cost reductions (*e.g.*, reduced labor and maintenance expenses) that have exceeded the amounts of the revenue divisions that UP has paid to M&NA in accordance with Section XXII of the Lease

27. UP has provided extremely poor service during a number of different time periods over the term of the Lease, including but not limited to, the time periods following the 1993 Midwest floods, UP's Service Crisis in 1997 and 1998 after its merger with Southern Pacific Transportation Company,³ and the time period following the May 2005 derailments that

³ See, *e.g.*, *Supplemental Statement and Additional Request for Emergency Relief of Entergy Services, Inc. and Entergy Arkansas, Inc.*, filed December 1, 1997 in Ex Parte No. 575, *Rail Service in the Western United States* and Service Order No. 1518, *Joint Petition for Service Order*.

UP and BNSF experienced on their jointly owned line in Wyoming.⁴ The existence of the UP/M&NA paper barrier precluded Entergy from obtaining interline service from BNSF/M&NA via a more efficient routing at times when UP's service was very poor and Entergy was forced to curtail coal-fired generation and incur major damages in the form of significantly higher costs for gas-fired generation or purchased power.

COUNT I (Unreasonable Practice)

28. Entergy hereby incorporates paragraphs 1-27 as if repeated in their entirety

29. Section IV of the UP/M&NA Lease ("Rent") establishes an annual rent payment system that effectively operates as a ban on the interchange of Entergy's Independence traffic with other carriers and thus is subject to a higher level of scrutiny by the Board. *See Paper Barriers Decision* at 15.

30. Section IV of the UP/M&NA Lease continues effectively in perpetuity (*i.e.*, for the entire term of the Lease which could be as long as eighty years) and thus is subject to a higher level of scrutiny by the Board. *See Paper Barriers Decision* at 15.

31. The continued enforcement of the annual rental amounts set forth in Section 4.03, as adjusted, is unreasonable in light of: (i) the fact that UP already has obtained significant net financial benefits in the form of cost reductions that exceeded the amount of revenue divisions through the first fifteen years of the term of the Lease; and (ii) the fact that UP

⁴ Entergy is currently involved in litigation in *Union Pacific R R v Entergy Arkansas, Inc. and Entergy Services, Inc.*, Case No. CV 2006-2711 in the Circuit Court of Pulaski County, Arkansas, with respect to events following the derailments that occurred in May, 2005 on the Joint Line in the PRB.

has enjoyed the benefit of monopoly rates for service in conjunction with M&NA during the course of those fifteen years.

32. The continued enforcement of these rental amounts also is unreasonable in relation to the amount of any contribution that would be lost (or could be lost) by UP as the result of being forced to price its rail transportation services to meet a competitive rate offering from another long-haul carrier. Stated differently, the annual rental amounts in Section 4.03 that would be applicable in the event of a diversion of some or all of the Independence traffic are unreasonable in relation to the difference between the revenues that would be associated with: (i) a monopoly UP rate offering for service to Independence, and (ii) a UP rate offering for service to Independence in the absence of the paper barrier restrictions.

33. The existence of the UP/M&NA paper barrier precluded Entergy from obtaining interline service from BNSF/M&NA using a routing that is more favorable than the UP/M&NA routing at times when UP was experiencing service difficulties. UP's service failures have had a significantly adverse effect upon Entergy and its customers. Consequently, the enforcement of the UP/M&NA paper barrier has had an adverse impact – and will continue to have an adverse impact – on Entergy's ability to obtain adequate and reliable coal transportation service to Independence

34. The continued enforcement of Section IV of the UP/M&NA Lease, which establishes a paper barrier restriction to interchange, is contrary to the public interest because it is unduly restrictive and unwarranted under the circumstances. Since the harm associated with Section IV exceeds any benefit that it may have, the continued enforcement of this Section is contrary to the public interest and constitutes an unreasonable practice in violation of 49 U.S.C. § 10702.

COUNT II (Unreasonable Practice)

35. Entergy hereby incorporates paragraphs 1-34 as if repeated in their entirety.

36. Sections III, V, and XV of the UP/M&NA Lease each operate to reinforce the paper barrier established through the rental provision of that agreement. Specifically, Section III gives UP the right to provide exclusive service via trackage rights to Independence on seven days' notice. Section V limits M&NA's use of trackage rights over UP's line between Pleasant Hill and Kansas City, Missouri to service provided in interchange with UP. Finally, Section XV provides for termination of the Lease if a court or other body determines that the rental provisions are unlawful or otherwise improper.

37. Section III of the UP/M&NA Lease operates as a complete ban on interchange, if invoked by UP, and continues in perpetuity. This provision is therefore subject to higher scrutiny by the Board. *See Paper Barriers Decision at 15.*

38. Section III of the UP/M&NA Lease is unreasonable and contrary to the public interest because it allows UP to perpetuate its control over the Independence Station through the exercise of exclusive trackage rights.

39. Section V of the UP/M&NA Lease operates as a complete ban on interchange at Kansas City, Missouri, and continues in perpetuity. This provision is therefore subject to higher scrutiny by the Board. *See Paper Barriers Decision at 15.*

40. Section V of the UP/M&NA Lease is unreasonable and contrary to the public interest because it allows UP to perpetuate its control over Entergy's traffic by limiting M&NA's access to carriers other than UP.

41. Section XV of the UP/M&NA Lease operates as a complete ban on interchange, if invoked by UP, and continues in perpetuity. This provision is therefore subject to higher scrutiny by the Board. *See Paper Barriers Decision* at 15.

42. Section XV of the UP/M&NA Lease is unreasonable and contrary to the public interest because it allows UP to perpetuate its control over Entergy's traffic by terminating the Lease in the event that the rental provision is found to be improper.

43. The continued enforcement of Sections III, V, and XV – to the extent that they allow UP to perpetuate the effect of its paper barriers – is contrary to the public interest and constitutes an unreasonable practice in violation of 49 U.S.C. § 10702.

COUNT III (Petition to Revoke in Part)

44. Entergy hereby incorporates paragraphs 1-27 as if repeated in their entirety.

45. Under 49 U.S.C. § 10502(d), the Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of Title 49 to the subject transaction is necessary to carry out the transportation policy set forth in 49 U.S.C. § 10101.

46. The national rail transportation policy set forth in 49 U.S.C. § 10101 states that it is the policy of the United States Government: “(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;” “(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the

public and the national defense;" and "(12) . . . to avoid undue concentrations of market power"

47. The paper barrier restrictions set forth in the UP/M&NA Lease operate to restrict competition unreasonably and to concentrate market power over Entergy's Independence traffic in the hands of a single carrier, in violation of the national rail transportation policy.

48. The Board should revoke the exemption noticed by M&NA to the extent that it authorized the imposition of the paper barrier restrictions set forth in the UP/M&NA Lease.

COUNT IV (Pooling and/or Traffic Division Arrangement)

49. Entergy hereby incorporates paragraphs 1-27 as if repeated in their entirety.

50. Under 49 U.S.C. § 11322, a rail carrier providing transportation subject to the jurisdiction of the Board may not agree or combine with another carrier subject to the jurisdiction of the Board to pool or divide traffic or services or any part of their earnings without the approval of the Board under Section 11322 or Section 11323 of Title 49.

51. The Board may approve and authorize such an agreement if the subject rail carriers assent to the pooling or division and if the Board finds that a pooling or division of traffic, services, or earnings: (1) will be in the interest of better service to the public or of economy of operation; and (2) will not unreasonably restrain competition. 49 U.S.C. § 11322(a).

52. At the time of the execution of the UP/M&NA Lease, former 49 U.S.C. § 11342 imposed the same restriction upon rail carriers subject to the jurisdiction of the Board. *See former* 49 U.S.C. § 11342 ("A common carrier providing transportation subject to the

jurisdiction of the [ICC] may not agree or combine with another of those carriers to pool or divide traffic or services or any part of their earnings without the approval of the Commission under this section or sections 11124 or 11125 of this title.”).

53. The UP/M&NA Lease operates as a pooling and/or traffic division agreement subject to the restriction of Section 11322 and former Section 11324. *See, e.g., Chicago & N W Ry. v. Peoria & P.U Ry.*, 319 F.2d 117 (7th Cir. 1963).

54. Upon information and belief, the parties to the UP/M&NA Lease neither sought nor obtained approval for the UP/M&NA Lease under Section 11322 or former Section 11324.

55. Under 49 U.S.C. § 11322(b), the Board may impose conditions governing the pooling or division of traffic or services and may approve and authorize payment of a reasonable consideration between the rail carriers.

56. The paper barrier provisions of the UP/M&NA Lease render that agreement contrary to the public interest and unreasonably restrain competition, in violation of 49 U.S.C. § 11322.

WHEREFORE, Entergy requests that the Board: (1) institute a proceeding to address the issues raised by this Complaint; (2) enter an order finding that the continued enforcement of Sections 4.01, 4.03, 3.01, 3.04, 5.05, and 15.01 of the UP/M&NA Lease collectively constitutes an unreasonable and unlawful practice and direct the Defendants that such provisions shall not be enforced or given effect to limit or prevent M&NA from receiving coal traffic from BNSF and transporting it over the leased lines to the Independence Station; or, in the alternative (3) revoke the exemption in Finance Docket No. 32187 to the extent necessary


to prevent continued enforcement of Sections 4.01, 4.03, 3.01, 3.04, 5.05, and 15.01; or, in the alternative, (4) find that the UP/M&NA Lease constitutes a pooling and/or traffic division agreement for which authorization was not properly obtained and condition any approval of that agreement under 49 U.S.C. § 11322 to prevent continuing enforcement of the various paper barrier provisions; and (5) take such other actions as may be reasonable and necessary.

Respectfully submitted,

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ENTERGY SERVICES, INC.
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Dated: February 19, 2008

Attorneys & Practitioners

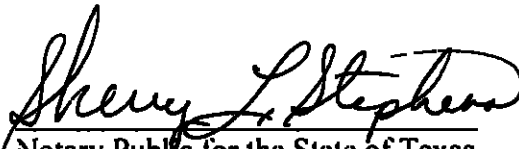
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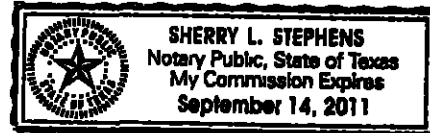
STATE OF TEXAS)
) ss:
COUNTY OF MONTGOMERY)

William Mohl, being duly sworn, deposes and says that he is the Vice President – System Planning & Operations of Entergy Services, Inc.; that has read the foregoing “Verified Complaint or in the Alternative Petition to Revoke in Part,” and knows the contents thereof; and that the same are true as stated, except as to those statements made on information and belief, and as to those, that he believes them to be true.


William Mohl, Vice President
System Planning & Operations
Entergy Services, Inc

Subscribed and sworn to before me
this 15th day of FEBRUARY, 2008.


Notary Public for the State of Texas



My Commission expires 9/14/11

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of February, 2008, served copies of the foregoing on the Chief Legal Officers of each of the Defendants, and the General Manager of M&NA, and the Chief Legal Officer of BNSF Railway Company by overnight courier as follows:

J. Michael Hemmer, Esq. (**CONFIDENTIAL VERSION**)
Sr V.P. Law & General Counsel
Union Pacific Railroad Company
Union Pacific Center
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Andrew B. Kolesar III

1

As filed with the Securities and Exchange Commission on November 19, 1993

BEST AVAILABLE COPY

Registration No. 33-68938

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C. 20549



93 26 0145

POST-EFFECTIVE AMENDMENT NO. 1

TO

FORM S-1

REGISTRATION STATEMENT

UNDER

THE SECURITIES ACT OF 1933

REC'D S.E.C.

NOV 19 1993

010

RailTex, Inc.

(Exact name of Registrant as specified in its charter)

Texas

(State or other jurisdiction of incorporation or organization)

4011

(Primary Standard Industrial Classification Code Number)

74-1948121

(I.R.S. Employer Identification No.)

4040 Broadway, Suite 200
San Antonio, Texas 78209
(210) 841-7600

(Address, including zip code and telephone number, including area code of Registrant's principal executive office)

Bruce M. Flehr
Chairman of the Board and President
RailTex, Inc.

4040 Broadway, Suite 200
San Antonio, Texas 78209
(210) 841-7600

(Name, address, including zip code and telephone number, including area code, of agent for service)

Copies to:

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New York, New York 10022
(212) 848-4000

Approximate date of commencement of proposed sale of securities to public: As soon as practicable after this Registration Statement becomes effective.

If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933, check the following box. ☐

This Post-Effective Amendment No. 1 to the Registration Statement shall become effective on such date as the Commission, acting pursuant to Section 8(c), may determine.

Total of sequentially numbered pages 1166
Exhibit Index on sequential page number 87

EXHIBIT 10.18

LESSEE COUNTERPART

— ORIGINAL - DO NOT REMOVE —

CONFIDENTIAL

L E A S E A G R E E M E N T

BY AND BETWEEN

MISSOURI PACIFIC RAILROAD COMPANY

AND

MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.

CONFIDENTIAL

CONFIDENTIAL

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LEASE AGREEMENT

THIS LEASE AGREEMENT, dated as of the 14th day of December, 1992, by and between MISSOURI PACIFIC RAILROAD COMPANY, a Delaware corporation ("Lessor") and MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC., a Kansas corporation ("Lessee").

RECITALS:

A. Lessee intends to lease certain lines of railroad in the States of Arkansas, Missouri and Kansas from Lessor as follows: the Carthage Branch from milepost 643.13 near Pleasant Hill, MO, to milepost 415.0 at Bergman, AR, and from milepost 313.0 at Guion, AR, to milepost 259.05 near Diaz Junction, AR, a total distance of 282.08 miles; the Clinton Branch from milepost 262.6 near North Clinton, MO, to milepost 340.5 near Griffith, KS, a distance of 78.3 miles (there is a 1.4 mile equation between mileposts 272 and 273); the Webb City Branch from milepost 527.94 near Carthage, MO, to milepost 544.66 near Joplin, MO, a distance of 16.72 miles; the Atlas Branch from milepost 0.07 near Webb City, MO, to milepost 6.43 near Atlas, MO, a distance of 6.36 miles and the Wallis Spur from milepost 506.59 near Wallis, MO, to milepost 512.40 near Springfield, MO, a distance of 5.81 miles, including 0.11 miles of rights over Burlington Northern Railroad Company trackage as indicated below. By way of the assignment document referenced in Section 14.07, the Lessor also will assign to Lessee, Lessor's trackage rights over 0.11 miles of

Burlington Northern Railroad Company (hereinafter "BN")
trackage in Springfield, Missouri and over BN trackage
from chaining station 14187+07 near Aurora, MO, to
chaining station 10637+09+2354 feet near Springfield, MO,
as set forth in that separate agreement between Lessor
and BN dated July 8, 1970. The foregoing trackage shall
be referred to hereinafter as "Leased Premises".

B. The parties desire to enter into this Lease
Agreement to set forth the terms and conditions for the
use, management and operation of the Leased Premises
described above.

AGREEMENT:

NOW, THEREFORE, in consideration of the foregoing and
other good and valuable consideration, intending to be legally
bound, the parties do hereby agree as follows:

SECTION I
LEASED PREMISES

SECTION 1.01 -- Lessor does hereby lease to Lessee and Lessee
does hereby lease from Lessor the Leased Premises described in the
Recitals above and the property described in Section 1.02.

SECTION 1.02 -- The Leased Premises shall include, without
limitation, right-of-way, tracks, rails, ties, ballast, other track
materials, switches, crossings, bridges, culverts, buildings,
crossing warning devices and any and all improvements or fixtures
affixed to the right-of-way as indicated on Exhibit A hereto
attached, but excluding radio and microwave communications
structures and equipment and any and all items of personal property
not owned by Lessor or not affixed to the land, including, without

limitation, railroad rolling stock, locomotives, equipment, machinery, tools, inventories, materials and supplies. Within thirty (30) days after the Commencement Date (which is defined in section 2.01), Lessor shall remove all its personal property from the Leased Premises. Items not so removed shall be deemed included in the Leased Premises. Lessee expressly acknowledges that Lessor has previously leased and/or licensed portions of the Leased Premises. This Lease is made subject to those leases and licenses. To the extent that there exists, on the Leased Premises, property owned by such prior lessees or licensees, that property may remain on the Leased Premises to the extent permitted by the terms of the lease or license under which it was placed on the Leased Premises.

SECTION 1.03 -- Lessee shall take the Leased Premises in an "AS IS, WHERE IS" condition and without any express or implied warranties, including but not limited to any warranties of merchantability and subject to: (a) reservations or exceptions of record of minerals or mineral rights, including but not limited to all coal, oil, gas, casinghead gasoline and minerals of any nature and character whatsoever underlying the Leased Premises together with the sole, exclusive and perpetual right to explore for, remove, and dispose of said minerals by any means or methods suitable to Lessor, (b) all easements, public utility easements and rights-of-way, howsoever created, for crossings, pipelines, wirelines, fiber optic facilities, roads, streets, highways and other legal purposes; (c) existing and future building zoning, subdivision and other applicable federal, state, county, municipal and local laws, ordinances and regulations; (d) encroachments or

other conditions that may be revealed by a survey, title search or inspection of the property; (e) all existing ways, alleys, privileges, rights, appurtenances and servitudes, howsoever created; (f) any liens of mortgage or deeds of trust encumbering said property; (g) the Lessor's exclusive right to grant any and all easements, leases, licenses or rights of occupancy in, on, under, through, above, across or along the Leased Premises, or any portion thereof, for the purpose of construction, installation, operation, use, maintenance, repair, replacement, relocation and reconstruction of any fiber optic facilities, signboards or coal slurry pipeline PROVIDED, HOWEVER, that the exercise of these rights shall not materially interfere with Lessee's railroad operations, and that the entry onto the Leased Premises by Lessor or an authorized third party in order to accomplish the foregoing purposes shall be upon prior written notice to Lessee, which notice shall include a reasonably detailed explanation of the acts to be taken or work to be performed; and (h) the right, interests, contracts, agreements, leases, licenses and easements (which are hereinafter referred to as "Lessor Agreements" or "Lessee Agreements" as defined in Sections 14.01 and 14.03) and any Supplemental Agreements or Amendments thereto which are or become effective on or prior to the Commencement Date hereof. The Lessee Agreements to be assigned to Lessee are identified in the attached Exhibit B.

SECTION 1.04 -- Lessor agrees that it will, so long as Lessee is not in default under the terms and provisions of this Lease, indemnify and hold Lessee harmless from and against any damages, losses and losses of reasonably anticipated net income from its

operation of the Leased Premises (discounted to present value) resulting from any foreclosure of any mortgage on any segment of the Leased Premises or resulting from any actions by any mortgage holder which adversely affects Lessee's use and operation of any segment(s) of the Leased Premises.

SECTION II
LEASE TERM

SECTION 2.01 -- Unless this Agreement is terminated earlier in accordance with Section XV, Lessee shall have and hold the Leased Premises unto itself, its successors and assigns, for a term of twenty (20) years beginning on the Commencement Date. The Commencement Date shall be five (5) days after Lessor has notified Lessee in writing that Lessor has satisfactory evidence of compliance with the conditions precedent provided in Section V unless such notice period is waived by mutual agreement.

SECTION 2.02 -- Subject to Lessor's possible reacquisition of the Leased Premises pursuant to this Agreement, Lessee shall have the right to extend the term of this Lease three (3) times for an extended term of up to twenty (20) years for each extension. Lessee shall notify Lessor of any election to extend the term hereof by giving Lessor not more than 12 months, but not less than 6 months' written notice prior to the expiration of the then current lease term.

SECTION 2.03 -- If, subject to the right of Lessor to evict or remove Lessee from the Leased Premises by all available legal means, Lessee holds over and remains in possession of the Leased Premises following expiration of the then current term, original or extended, or following an early termination of this Lease pursuant

to Section XV, such holding over will create a month-to-month tenancy only. During any such hold over period, Lessee agrees to pay to Lessor as rent, a sum equal to one-twelfth (1/12th) of the Annual Rental, as adjusted pursuant to Section 4.04, required pursuant to the first sentence of Section 4.01 without, however, any reduction pursuant to the schedule set forth in Section 4.03. Such monthly payments shall be due each month on the same day of the month as the Anniversary Date of this Lease. Any profits or losses from Lessee's operations during any holdover period shall enure and accrue to the Lessee.

SECTION III **RAIL SERVICE**

SECTION 3.01 -- Beginning on the Commencement Date and throughout the term of this Lease, Lessee shall be entitled to full and exclusive use of the Leased Premises for the operation of common carrier rail freight service, including the right to access and interchange traffic directly with all present and future railroads at Springfield, Joplin, Carthage, Lamar, Aurora and Nevada, MO and Ft. Scott, KS. During the term hereof, Lessor shall not have the right to operate trains over the Leased Premises, except that Lessor may obtain trackage rights between Diaz Junction and Independence, AR, after giving seven days' written notice to Lessee to serve, on an exclusive basis, the Arkansas Power and Light Company (AP&L) plant located at Independence, AR, either at AP&L's request or at Lessor's sole discretion. Lessor would pay Lessee \$60,000 per year for these rights if they are obtained. Lessor shall not grant trackage rights to any third party. Except for the Southeast Kansas Railroad operation between Nassau Junction

and Nevada, MO, Lessor further warrants that as of the date of this Lease, there is no other freight rail carrier to which Lessor has granted rights to use the Leased Premises other than pursuant to joint facility agreements or arrangements that are superior to those granted herein to Lessee. During the term hereof, Lessee shall not grant to any third party the right to operate over the Leased Premises, nor shall it enter into any commercial or other agreement to move the traffic of any third party over the Leased Premises without the prior written consent of Lessor. During the term hereof, Lessee shall not use the Leased Premises for any purpose other than for rail freight service, or with prior consent of Lessor, rail passenger service.

SECTION 3.02 -- During the term of this Lease, Lessee will not suspend or discontinue its operation as a common carrier by rail over all or any part of the Leased Premises without first applying for and obtaining from the ICC, and any other regulatory agency with jurisdiction, any necessary certificate of public convenience and necessity or other approvals or exemptions from regulation for such discontinuance of operations over the Leased Premises; PROVIDED, HOWEVER, that Lessee will not seek such regulatory authority, or if no regulatory authority is needed, take any action to suspend or discontinue its operations on the Leased Premises, without first giving Lessor sixty (60) days' notice of Lessee's intent to do so.

SECTION 3.03 -- Upon suspension or discontinuance of Lessee's operations as a rail carrier of freight over all or any part of the Leased Premises during the term or any extended term hereof, for reasons other than events of force majeure or a lawful embargo,

whether or not pursuant to necessary and proper regulatory authority as required by Section 3.02 of this Section III, Lessee will promptly relinquish to Lessor possession of the Leased Premises and this Lease Agreement will terminate as provided by Section XV of this Lease; PROVIDED, HOWEVER, any discontinuance of service or abandonment of any portion(s) of the Leased Premises which are inconsequential to rail freight service over the Leased Premises generally will be permitted and will not result in a termination of this Lease or require relinquishment of possession of the Leased Premises by Lessee.

SECTION 3.04 -- Lessor may acquire the right to operate over the Leased Premises between milepost 259.05 at Diaz Junction and milepost 270.00 near Independence to serve AP&L and, if this right is exercised, Lessee shall no longer have the right to serve AP&L, and AP&L shall become a closed industry served only by Lessor. This right shall be acquired effective seven days after Lessee's receipt of Lessor's written notice to Lessee that Lessor desires to begin operation over such trackage.

SECTION IV **RENT**

SECTION 4.01 -- In consideration of this Lease, and subject to the terms and provisions set forth herein, Lessee agrees to pay Lessor rent for the Leased Premises in the amount of Ninety Million Dollars (\$90,000,000) per year payable annually in advance on the 1st day of March; PROVIDED, HOWEVER, that subject to the provisions of Section 4.02 hereof, for each lease year that 95% or more of all traffic originating or terminating on the Leased Premises is interchanged with Union Pacific Railroad Company or Missouri

Pacific Railroad Company and any affiliated company, their successors and assigns, Lessor agrees that it will waive or partially waive the rent for that particular year in accordance with the schedule set forth in Section 4.03. The 95% level must be achieved separately and simultaneously on the Pleasant Hill-Bergman (including connecting branches) and Guion-Diaz Junction segments.

SECTION 4.02 -- The following traffic shall not be counted in calculating either total traffic or the percentage of traffic in Section 4.03: (a) Industries open to reciprocal switching at Ft. Scott, KS; Lamar, MO; Joplin, MO; Carthage, MO; Aurora, MO; and Springfield, MO as shown in Exhibit C, and (b) traffic that is local to Lessee, i.e., traffic which both originates and terminates at stations on the Leased Premises or at the stations served by Lessee pursuant to the Line Sale Contract between Lessor and Lessee which is being executed by the parties concurrently with this Agreement, and not involving line haul movement by any railroad other than Lessee. Lessor will consider further exceptions to this section on a case by case basis.

SECTION 4.03 -- Upon request of Lessor, on or before the 1st day of February of each year following the commencement of this Lease, Lessee shall submit a report, signed by an officer of Lessee, certifying the amount and type of traffic originating or terminating on the Leased Premises during the prior calendar year, the railroads (if any) with which all or portions of such traffic were interchanged, the volume of traffic interchanged with each such railroad, and the total amount of rent due and payable for the previous calendar year. The rent due from Lessee for the Year shall be determined by reference to the percentage of the total

traffic (as described in Section 4.01, subject to the provisions of Section 4.02) that was interchanged with Lessor, subject to the terms of Section 4.04, in accordance with the following schedule:

**PERCENTAGE OF THE TOTAL
TRAFFIC THAT WAS INTER-
CHANGED WITH LESSOR**

RENT DUE LESSOR

100 - 95%	\$ -0-
94 - 85%	\$10,000,000
84 - 75%	\$20,000,000
74 - 65%	\$20,000,000
64 - 55%	\$30,000,000
54 - 45%	\$40,000,000
44 - 35%	\$50,000,000
34 - 25%	\$60,000,000
24 - 15%	\$70,000,000
14 - 5%	\$80,000,000
0 - 4%	\$90,000,000

Lessee shall pay to Lessor all rent determined to be payable pursuant to this Section 4.03 on or before March 1st for each calendar year following the commencement of this Lease.

SECTION 4.04 -- Rent shall be adjusted each year to reflect changes in the Producer Price Index - Finished Goods (the "Index") and the amount due each year shall be determined as follows:

The Index for the month of December 1992 shall be deemed to be the base index ("Base Index"). Rent shall be adjusted annually as of each December thereafter by multiplying the rent shown in Section 4.03 by a fraction, the denominator of which is the Base Index and the numerator is the Index for the month of December in each year. The term "Producer Price Index" shall mean the Producer Price Index - Finished Goods (Reference Base 1982 = 100), published by the United States Department of Labor, Bureau of Labor Statistics, or, if the Producer Price Index ceases to be published, such comparable index or measure of change in the

purchasing power of the dollar as may then be in common usage of adjustments in rents. Adjustments so made each December shall be effective for the following calendar year.

SECTION 4.05 -- Lessee shall pay all due rent payments, and all other payments required by this Lease, to Lessor at 1416 Dodge Street, Omaha, Nebraska 68179, Attn: Senior Director of Interline Marketing, or at such other location or to such other individual as may be designated by Lessor in writing .

SECTION 4.06 -- If Lessee fails to pay any installment of rent when due, and such failure continues for thirty (30) days, Lessee shall pay interest at the rate of 2% over the prime rate of CHASE MANHATTAN BANK, N.A., its successors and assigns, in effect on the day the rent was due, which interest shall accrue from the date it was due until the date of payment. No such failure to pay any installment will accrue any interest or constitute an Event of Default in the event it is determined that no rent was, in fact, payable by reason of the provisions of Section 4.03.

SECTION 4.07 -- Acceptance by Lessor, its successors, assigns or designees of rent or other payments shall not be deemed to constitute a waiver of any other provision of this Lease.

SECTION 4.08 -- Upon receipt by Lessor of the report required by Section 4.03, Lessor shall, upon giving at least fifteen (15) days' written notice, have the right, at its sole cost and expense, to review and audit all of Lessee's records relating to or forming the basis for such report.

SECTION 4.09 -- As additional security for the payment by Lessee to Lessor of any sums of money required hereunder to be paid by Lessee, it is agreed that in the event Lessee fails, neglects or

refuses to timely pay any sums due and owing to Lessor hereunder, Lessor may use any and all sums which it may collect from any third party and which may, in whole or in part, be payable to Lessee, as an offset against any and all payments for which Lessee is delinquent. In addition, any sums at any time due and payable to Lessee by Lessor may also be used by Lessor and credited to Lessor's account to the extent of any delinquent payment owed by Lessee to Lessor. Lessee does hereby waive any and all claims, demands and causes of action against Lessor which it may have or claim to have as a result of Lessor's use or implementation of the provisions of this Section 4.09 and/or any offset.

SECTION V
CONDITIONS PRECEDENT

As conditions precedent to either party's obligations hereunder:

SECTION 5.01 -- Lessor and Lessee shall have received Board of Directors' approval for this transaction.

SECTION 5.02 -- There shall not be a work stoppage imminent or in effect on the lines of Lessor or any of its affiliated companies as a result of the execution and/or implementation of this Lease.

SECTION 5.03 -- Lessee shall have acquired the right to conduct rail freight service over the Leased Premises from the Interstate Commerce Commission, and shall have obtained such judicial, administrative agency or other regulatory approvals, authorizations or exemptions as may be necessary to enable it to undertake its obligations hereunder.

SECTION 5.04 -- Lessor and Lessee shall not be prevented from fulfilling their respective obligations under this Lease as a result of legislative, judicial or administrative action.

SECTION 5.05 -- Lessor and Lessee shall execute trackage rights agreements between Kansas City (Neff Yard) and Pleasant Hill, MO and between Diaz Junction and Newport, AR (Lessee over Lessor's tracks) solely for the purpose of interchange with Lessor.

SECTION 5.06 -- Lessee shall not have discovered any contract, agreement, award, judgment, title defect or condition which would prevent Lessee from operating a rail freight operation on the Leased Premises in substantially the same manner as presently conducted by Lessor. Upon execution hereof, Lessor shall make available for Lessee's inspection and review all contracts, deeds, agreements and documents pertaining to or affecting the Leased Premises. Lessee shall notify Lessor in writing within forty-five (45) days from date of execution hereof whether or not its review of Lessor's records and the Leased Premises has satisfied this condition precedent.

SECTION 5.07 -- Lessee and Lessor are agreeable to any conditions which might be imposed by the Interstate Commerce Commission or other regulatory body as part of the authority required to consummate this transaction.

SECTION VI
MAINTENANCE

SECTION 6.01 -- During the term hereof, Lessee shall maintain the Carthage Subdivision main track of the Leased Premises between mileposts 643.13 and 259.05 to Class 3 standards, as defined by the Federal Railroad Administration and capable of operating speeds of

at least 40 miles an hour, with the speed restrictions in effect as of the date of the Lease as shown in Exhibit D. All other leased track shall be maintained to the class necessary to maintain speeds as shown in Exhibit D at Lessee's own cost and expense and to a standard that is sufficient to continue rail freight service commensurate with the needs of the rail users located thereon. Lessor shall have no obligation under the terms of this Lease to perform any maintenance upon, or furnish any materials for the maintenance of the Leased Premises during the term hereof. Lessee shall comply with all applicable federal, state or local laws, ordinances and regulations and shall protect the Leased Premises against all encroachments or unauthorized uses. Lessee shall not apply for any Federal or State funding for rehabilitation or maintenance of the Leased Premises unless Lessor provides written consent to such application.

SECTION 6.02 -- Lessor shall have the right to inspect the Leased Premises at all reasonable times. Lessor shall notify Lessee in writing of any deficiencies in Lessee's maintenance program and Lessee shall, within ninety (90) days of its receipt of such notice, commence necessary repairs and maintenance and shall proceed to complete same with reasonable diligence. Lessee may relocate switches and industrial tracks from one location on the Leased Premises to another location on the Leased Premises upon receiving any necessary and proper regulatory authority and after ten (10) days' written notice to Lessor. Any rehabilitation or reconstruction, including but not limited to that necessitated by an Act of God, will be the sole responsibility of Lessee. Such maintenance will include any function which Lessor, but for this

Lease, would be required to perform pursuant to applicable federal, state, and municipal laws, ordinances, and regulations.

SECTION 6.03 -- Nothing herein shall preclude Lessee, at its sole cost and expense, from maintaining the Leased Premises to a standard higher than the minimum herein provided, but Lessee shall not be required hereunder to do so.

SECTION 6.04 -- Lessee's maintenance obligations hereunder shall include, but shall not be limited to, highway grade crossings, grade crossing signal protection devices, bridges, culverts and other structures, and sub-roadbed. Lessee agrees that all grade crossings and grade crossing protection devices will be given a high priority in Lessee's maintenance program.

SECTION 6.05 -- Without the prior written consent of Lessor, Lessee will not replace existing track and other track materials ("OTM") on the Leased Premises with substitute or replacement track or OTM having a lighter weight, of lesser quality, or having a lower fair market value. Such requirement shall also apply to all other facilities leased hereunder. Any repair or replacement of welded rail shall also be welded. Lessee may make any replacement and substitute with any material having the same or higher weight and quality as the materials being replaced, without the prior written consent of the Lessor, provided that the work being performed by the Lessee and the materials being provided by the Lessee are sufficient to maintain the trackage to the standards set forth in Section 6.01.

SECTION 6.06 -- Subject to Section XII, Lessee will pay, satisfy, and discharge all claims or liens for material and labor or either of them used, contracted for, or employed by Lessee

during the term of this Lease in any construction, repair, maintenance, or removal on the Leased Premises and any improvements located thereon, whether said improvements are the property of Lessor or of Lessee, and Lessee will indemnify and save harmless Lessor from all such claims, liens, or demands whatsoever.

SECTION VII
ACCOUNTING AND REPORTING

SECTION 7.01 -- Lessee agrees to furnish to Lessor such copies of reports pertaining to Lessee and the Leased Premises prepared in the normal course of Lessee's business as Lessor may reasonably request and Lessee may lawfully furnish. Upon request, Lessee will deliver to Lessor copies of all financial statements showing the financial condition of Lessee which are furnished by Lessee to the Interstate Commerce Commission ("ICC"), FRA (pursuant to any agreement between FRA and Lessee relating to financial assistance), the Securities & Exchange Commission ("SEC") or stockholders. All such financial statements will be furnished to Lessor at the same time as they are furnished to other parties.

SECTION 7.02 -- Irrespective of any obligations of Lessee to furnish financial statements to others, Lessee shall furnish Lessor financial statements prepared in accordance with generally accepted accounting principles (which need not be in addition to those furnished to others as aforesaid) fairly presenting the financial position and results of operation of Lessee as and at the end of each fiscal year. Such statements shall be furnished to Lessor within ninety (90) days following the end of each fiscal year.

SECTION VIII
MODIFICATIONS AND IMPROVEMENTS

SECTION 8.01 -- In connection with its use of the Leased Premises, Lessee shall have the right to remove, replace, add to or relay elements of the Leased Premises in the interest of cost or operating efficiency, provided that a continuous and usable line of railroad between the termini in effect on the Commencement Date is maintained. Lessee shall have the right to apply the net proceeds from salvaged materials to maintenance or improvement of the Leased Premises; provided that any such net proceeds not reinvested in the Leased Premises shall be paid to Lessor. Improvements to the Leased Premises, whether normal maintenance or otherwise, will be treated as capital expenditures or operating expenses under the then current rules of the ICC; and, except as provided in Section 8.03, such improvements shall become part of the Leased Premises and, at the termination of this Lease, shall be the property of Lessor unless Lessor has determined that Lessee may retain ownership as provided in Section 8.03.

SECTION 8.02 -- The provisions of Section 8.01 shall also apply and govern any work or maintenance done by Lessee pursuant to Section VI. On or before February 1st of each calendar year, Lessee shall provide Lessor with a written summary of all salvage or other materials removed from the Leased Premises, the proceeds received therefor and the manner in which the proceeds were reinvested. Failure to either reinvest such proceeds or pay any unreinvested proceeds to Lessor within six months following such reporting date shall, at Lessor's sole discretion, constitute a Default hereunder.

SECTION 8.03 -- Prior to making any improvement of the Leased Premises to which it desires to retain ownership, Lessee shall notify Lessor of its intent to make such improvement, and its desire to retain ownership thereof. If Lessor determines that an improvement may be removed or severed from the Leased Premises upon termination of this Lease without diminishing Lessor's investment in the Leased Premises and without interfering with the utilization of the Leased Premises as part of an interstate rail system, Lessor will notify Lessee that such improvement shall be Lessee's sole property and may be removed by Lessee upon termination of this Lease subject to Section XV of this Lease. Regardless of eventual ownership, Lessee shall notify Lessor prior to making any substantial improvement or modification of the Leased Premises costing in excess of \$25,000.

SECTION 8.04 -- Lessee may from time to time establish, relocate or remove sidetracks or industrial spur tracks on the Leased Premises after Lessee obtains any necessary regulatory authority. Lessor shall have no obligation to bear any cost of materials, construction or maintenance of said industrial spur tracks. That portion of any such spur track which is located upon the Leased Premises shall become part of the Leased Premises and, upon termination of this Lease, the property of Lessor. Any industry track agreement executed by Lessee shall first be submitted to Lessor for written approval, which shall not unreasonably be withheld. All industry track agreements, regardless of duration, shall contain provisions indemnifying Lessor and holding it harmless from all liability in connection with the construction, maintenance or operation thereof.

SECTION IX
REPRESENTATIONS AND WARRANTIES

SECTION 9.01 -- Lessor represents and warrants that:

(a) It has full statutory power and authority to enter into this Lease and to carry out the obligations of Lessor hereunder.

(b) Its execution of and performance under this Lease do not violate any statute, rule, regulation, order, writ, injunction or decree of any court, administrative agency or governmental body.

SECTION 9.02 -- Lessee represents and warrants that:

(a) It is a corporation duly organized, validly existing, and in good standing under the laws of the State of Kansas and is qualified to do business in the States of Arkansas, Missouri and Kansas.

(b) It has full power and authority to enter into this Lease, and, subject to necessary judicial and regulatory authority, to carry out its obligations hereunder.

(c) Upon expiration of the original or any extended term of this Lease or upon termination hereof by Lessor pursuant to Section XV, Lessee will bear any and all costs of protection of its current or future employees, including former employees of Lessor that may be employed by Lessee, arising from any labor protective conditions imposed by the ICC, any other regulatory agency or statute as a result of Lessee's lease or operation of the Leased Premises and any related agreements or arrangements, or arising as a result of the termination of this Lease. Nothing contained herein is intended to be for the benefit of any such employee nor should any employee be considered a third party beneficiary hereunder. Nothing in this Lease shall be construed as an

assumption by Lessee of any obligations to Lessor's current or former employees under collective bargaining or other agreements that may exist or have existed between Lessor and its employees, or any of them.

SECTION X
OBLIGATIONS OF THE PARTIES

SECTION 10.01 -- During the term hereof, Lessee will pay all bills for water, sewer, gas and electric service to the Leased Premises. If Lessor is required to, or does pay, any such bills, Lessee will promptly reimburse Lessor upon receipt of a bill or bills therefor. If the Leased Premises are not billed separately but as a part of a larger tract or parcel, Lessee shall pay that portion of such bills as is attributable to usage on or in connection with the Leased Premises.

SECTION 10.02 -- During the term of the Lease, Lessee will comply with all applicable federal, state and municipal laws, ordinances, and regulations.

SECTION 10.03 -- During the term of the Lease, Lessee will comply with all federal, state, and local laws, rules, regulations, and ordinances controlling air, water, noise, hazardous waste, solid waste, and other pollution or relating to the storage, transport, release, or disposal of hazardous materials, substances, waste, or other pollutants. Except to the extent that such activities are the responsibility of the Lessor under Section 10.04, Lessee at its own expense will make all modifications, repairs, or additions to the Leased Premises, install and bear the expense of any and all structures, devices, or equipment, and implement and bear the expense of any remedial

action which may be required under any such laws, rules, regulations, ordinances, or judgments. During the term of this Lease, Lessee will not dispose of any wastes of any kind, whether hazardous or not, on the Leased Premises.

SECTION 10.04 -- Lessee assumes the risk of and agrees to indemnify and hold Lessor harmless, and to defend Lessor against and from any claims, costs, liabilities, expenses (including without limitation court costs and attorneys' fees), or demands of whatsoever nature or source for any contamination or Environmental Problems, latent or obvious, discovered or undiscovered, in the real and chattel property to be conveyed hereunder; for personal injury to or death of persons whomsoever (including without limitation employees, agents or contractors of Lessor, Lessee, or any third party), or property damage or destruction of whatsoever nature (including without limitation property of Lessor or Lessee, or property in Lessee's care, custody, or control, and third party property), where such contamination, Environmental Problems, injury or damage arise out of acts, omissions or events occurring on the Leased Premises after the Commencement Date. Lessor assumes the risk of and agrees to indemnify and hold Lessee harmless, and to defend Lessee against and from any claims, costs, liabilities, expenses (including without limitation court costs and attorney fees), or demands of whatsoever nature or source for any contamination or Environmental Problems, latent or obvious, discovered or undiscovered, in the real and chattel property to be conveyed hereunder, for personal injury to or death of persons whomsoever (including without limitation employees, agents or contractors of Lessor, Lessee or any third party) or property

damage or destruction of whatsoever nature (including without limitation property of Lessor or Lessee, or property in its or their care, custody or control, and third party property) where such contamination, Environmental Problems, injury or damage arise out of acts, omissions or events occurring on the Leased Premises prior to the Commencement Date, provided, however, Lessee has the burden of proving such contamination, Environmental Problems, injury or damage arose out of such pre-Commencement Date acts, omission or events.

"Environmental Problems" means any cause or action under the federal Comprehensive Environmental Response Compensation and Liability Act of 1980 (as amended) and any cause or action arising from similar federal, state or local legislation or other rules of law, and private causes of action of whatever nature which arise from environmental damage, contamination, toxic wastes or similar causes.

If Lessor's indemnification of Lessee for such contamination or Environmental Problems becomes effective, Lessor has the right to assume sole control of and/or implement any order, demand, plan or request, or defend against any cause of action of whatever nature using legal and technical counsel of its choosing.

SECTION 10.05 -- Lessee will promptly furnish Lessor written notice of any and all (i) releases of hazardous wastes or substances of which it becomes aware which occur during the term of this Lease whenever such releases are required to be reported to any federal, state, or local authority, and (ii) alleged water or air permit condition violations, and (iii) any notification received by Lessee alleging any violation of any state, federal or

local statute, ordinance, ruling, order or regulation pertaining to environmental protection and/or hazardous material, handling transportation or storage. To the extent practicable, such written notice will identify the substance releases, the amount released, and the measures undertaken to clean up and remove the released material and any contaminated soil or water, will identify the nature and extent of the alleged violation and the measures taken to eliminate the violation, and will certify that Lessee has complied with all applicable regulations, orders, judgments or decrees in connection therewith, or the date by which such compliance is expected. Lessee will also provide Lessor with copies of any and all reports made to any governmental agency which relate to such releases or such alleged violations during the term of this Lease.

SECTION 10.06 -- During the term of this Lease, Lessor will have the right to enter the Leased Premises for the purpose of inspecting the Leased Premises to ensure compliance with the requirements of this Lease. If Lessor detects any violation, including any contamination of the Leased Premises which it deems to be the responsibility of Lessee under this Section X, Lessor will notify Lessee of the violation. Upon receipt of such notice Lessee will take immediate steps to eliminate the violation or remove the contamination to the satisfaction of any governmental agency with jurisdiction over the subject matter of the violation. Should Lessee inadequately remedy or fail to eliminate the violation, Lessor or its representative will have the right, but not the obligation, to enter the Leased Premises and to take

whatever corrective action Lessor deems necessary to eliminate the violation, at the sole expense of Lessee.

SECTION 10.07 -- Regardless of any acquiescence by Lessor, Lessee will (i) indemnify and hold harmless Lessor and its officers, agents, employees, lessors, parent corporation, subsidiaries, affiliates, successors, and assigns from all liability, costs, expenses, fines, or penalties resulting from any violation of any federal, state, or local law, rule, regulation, or ordinance controlling air, water, noise, hazardous waste, solid waste, or other pollution or relating to the storage, transport, release, or disposal of hazardous materials, substances, wastes, or other pollutants arising out of Lessee's operation of the Leased Premises and from any violations of this Section X, (ii) reimburse Lessor and its officers, agents, employees, lessors, parent corporation, subsidiaries, affiliates, successors, and assigns for all costs and expenses incurred by Lessor or its officers, agents, employees, lessors, parent corporation, subsidiaries, affiliates, successors, and assigns in eliminating or remedying such violations, pollution, or contamination, and (iii) reimburse and hold harmless Lessor and its officers, agents, employees, lessors, parent corporation, subsidiaries, affiliates, successors, and assigns from any and all costs, expenses, attorneys' fees, and penalties, fines, or civil judgments sought or obtained against Lessor or its officers, agents, employees, lessors, parent corporation, subsidiaries, affiliates, successors, and assigns as a result of Lessee's lease and operation of the Leased Premises or any release or disposal of any hazardous material, substance, waste, or other pollutant onto or into the ground or into the water

or air from or upon the Leased Premises during the term of this Lease; PROVIDED, HOWEVER, that Lessee shall have no obligation or liability where such release or disposal is attributable to acts or omissions of Lessor, its agents, employees or third parties acting under Lessor's authority.

Lessee waives and will not assert as a defense against Lessor any statute of limitations applicable to any controversy or dispute arising under this Section X, and Lessee will not raise or plead a statute of limitations defense against Lessor or its lessors in any action arising out of Lessee's failure to comply with this Section X.

SECTION XI **EMINENT DOMAIN**

SECTION 11.01 -- In the event that at any time during the term of this Lease the whole or any part of the Leased Premises shall be taken by any lawful power by the exercise of the right of eminent domain for any public or quasi-public purpose the following provisions shall be applicable:

SECTION 11.02 -- If such proceeding shall result in the taking of the whole or a portion of the Leased Premises which materially interferes with Lessee's use of the Leased Premises for railroad purposes, Lessee shall have the right, upon written notice to Lessor, to terminate this Lease in its entirety. In that event, and subject to any necessary regulatory approvals or exemptions, this Lease shall terminate and expire on the date title to the Leased Premises vests in the condemning authority, and the rent and other sums or charges provided in this Lease shall be adjusted as of the date of such vesting.

SECTION 11.03 -- If such proceeding shall result in the taking of less than all of the Leased Premises which does not materially interfere with Lessee's use of the Leased Premises for railroad purposes, then the Lease shall continue for the balance of its term as to the part of the Leased Premises remaining, without any reduction, abatement or effect upon the rent or any other sum or charge to be paid by the Lessee under the provisions of this Lease.

SECTION 11.04 -- Except as otherwise expressly provided in this Section, Lessor shall be entitled to any and all funds payable for the total or partial taking of the Leased Premises without any participation by Lessee; provided, however, that nothing contained herein shall be construed to preclude Lessee from prosecuting any claim directly against the condemning authority for loss of its business or for the value of its leasehold estate.

SECTION 11.05 -- Each party shall provide prompt notice to the other party of any eminent domain proceeding involving the Leased Premises. Each party shall be entitled to participate in any such proceeding, at its own expense, and to consult with the other party, its attorneys, and experts. Lessee and Lessor shall make all reasonable efforts to cooperate with each other in the defense of such proceedings and to use their best efforts to ensure Lessee's continued ability to use the Leased Premises for the conduct of freight railroad operations.

SECTION XII
INSURANCE AND INDEMNIFICATION

SECTION 12.01 -- Except where the sole proximate cause of any injury, death, loss or damage is the negligence of Lessor, its agents or employees, Lessee shall protect, defend, hold harmless,

and indemnify Lessor from and against any and all liability, expense, cost, claim or suit, including attorney's fees, incurred by or assessed against Lessor, its agents, servants, affiliated companies and its successors and assigns on account of injuries, death, or property loss or damage arising from Lessee's use, operation or maintenance of the Leased Premises, it also being the intent of the parties that Lessee shall indemnify Lessor for any negligence on Lessor's part which may contribute to any such injury, death, loss or damage; PROVIDED, HOWEVER, that all liability, including liability for any injury, death, loss, or damages arising in connection with toxic waste or environmental conditions shall be governed by the provisions of Section 10.04 hereof.

SECTION 12.02 -- Notwithstanding the provisions of Section 12.01, Lessee will be absolutely responsible for and will indemnify, defend and save harmless Lessor and its officers, agents, employees, affiliates, successors, and assigns from all liability, claims, penalties, fines, expenses, damages, and costs, including attorney's fees, arising from Lessee's violation of or from its failure to comply with any provisions of this Lease, regardless of whether contributed to by any negligence of Lessor or its officers, agents, employees, or affiliates, but not if due solely to the gross negligence of Lessor, its officers, agents, employees or affiliates.

SECTION 12.03 -- Lessee shall, at its own sole cost and expense, procure the following kinds of insurance for the term of this agreement commencing as of the date of Closing and promptly pay when due all premiums for that insurance. Upon the failure of

Lessee to maintain insurance as provided herein, Lessor shall have the right, after giving Lessee ten days written notice, to obtain such insurance and Lessee shall promptly reimburse Lessor for that expense. The following minimum insurance coverage shall be kept in force during the term of this Agreement:

Comprehensive Railroad Liability insurance providing bodily injury, including death, personal injury and property damage coverage with a combined single limit of at least \$10,000,000 each occurrence or claim and a general aggregate limit of at least \$10,000,000. This insurance shall contain Broad Form Contractual Liability covering the indemnity provisions contained in this Lease (ISO Form GL 24 14 or equivalent), severability of interests and name Lessor as an additional insured with respect to all liabilities arising out of Lessee's obligation to Lessor in the Lease. If coverage is purchased on a "claims made" basis it shall provide for at least a three (3) year extended reporting or discovery period, which shall be invoked should insurance covering the time period of this Lease be canceled unless replaced with a policy containing the same Retro Anniversary Date as the policy being replaced.

SECTION 12.04 -- Lessee warrants that this Lease has been reviewed with its insurance agent(s)/broker(s) and the agent(s)/broker(s) has been instructed to procure the insurance coverage required herein and name Lessor as additional insured with respect to all liabilities arising out of Lessee's obligation to Lessor.

SECTION 12.05 -- Lessee shall furnish to Lessor certificate(s) of insurance evidencing the required coverage and endorsement(s) and upon request a certified duplicate original of any of those policies. The insurance company(ies) issuing such policy(ies) shall notify Lessor in writing of any material alteration including any change in the retroactive date in any "claims made" policies or substantial reduction of aggregate limits, if such limits apply, or cancellation thereof at least thirty (30) days prior thereto.

SECTION 12.06 -- The insurance policy(ies) shall be written by a reputable insurance company or companies acceptable to Lessor or with a current Best's Insurance Guide Rating of B and Class X or better. Such insurance company shall be authorized to transact business in the States of Arkansas, Missouri and Kansas.

SECTION 12.07 -- Insurance coverage provided in the amounts set forth herein shall not be construed to otherwise relieve Lessee from liability hereunder in excess of such coverage, nor shall it preclude Lessee from taking such other action as is available to it under any other provision of this Agreement or otherwise in law.

SECTION 12.08 -- The limits of liability required under Section 12.03 shall be increased every five (5) years during the term hereof and any extended term based on any increases or decreases in the Producer Price Index, or any successor index, in the same manner as rent adjustments are calculated pursuant to Section 4.04.

SECTION XIII
TAXES

SECTION 13.01 -- It is understood and agreed that Lessee shall pay all taxes and assessments, general and special or otherwise which may be levied, assessed or imposed upon the Leased Premises during the Lease Term. Lessee shall pay such taxes and assessments directly to the taxing authorities on or before the due date, but reserves the right to contest any tax or assessment, in good faith, by appropriate proceeding, as it may deem necessary or appropriate.

SECTION 13.02 -- Lessee shall be liable for and pay all special assessments and/or taxes levied against the Leased Premises

as may be imposed by any taxing jurisdiction having authority in the premises.

SECTION 13.03 -- Real property ad valorem taxes, fees and special assessments, if any, shall be prorated between Lessor and Lessee as of January 1, 1993. Lessee shall be responsible for paying any and all such taxes, fees or assessments accruing after January 1, 1993.

SECTION XIV
EASEMENTS, LEASES AND LICENSES

SECTION 14.01 -- Lessor covenants and agrees to pay to the Lessee a portion of the revenues collected by Lessor from use of the Leased Premises pursuant to any easement, lease (excluding leases of trackage) or license (excluding licenses of trackage) affecting the use of the Leased Premises (hereinafter referred to as "Lessor Agreements"). The payment to be paid by Lessor in connection with this provision will be fifty percent (50%) of all amounts billed (as adjusted for the difference between billings and collections for prior periods) by Lessor pursuant to Lessor Agreements payable semi-annually in arrears on January 31 and July 31 of each year. Lessee shall not receive any amounts paid to Lessor for preparation fees and for services performed by Lessor pursuant to Section 14.03. At its discretion, Lessor may enter into new Lessor Agreements applicable to the Leased Premises without Lessee's consent. Lessee shall notify Lessor of any attempt to locate new customers on the Leased Premises, including the location of the possible new customers. If Lessor desires to lease the same portion of the Leased Premises, Lessor shall provide to Lessee thirty (30) days' advance notice of that intent.

Nothing in this Lease shall prevent Lessor from selling any portion or portions of the Leased Premises which is or are located beyond 50 feet of the centerline of any branch or main line track, including areas of any station ground provided such areas are not being used in connection with Lessee's rail freight operations. All proceeds from such real estate sales shall accrue solely to Lessor and Lessee shall either execute an amendment to this Lease which deletes any such sale property from the description and terms hereof, or shall execute any other document reasonably necessary to remove the encumbrance of this Lease from such property.

SECTION 14.02 - The revenues collected by Lessor described in Section 14.01 shall not be prorated as of the Commencement Date. Lessor shall be entitled to receive and retain all payments due and payable prior to the Commencement Date whether payable in advance or in arrears. If Lessee is not in default under this Agreement, Lessee will receive revenues due and payable prior to termination hereof.

SECTION 14.03 - From and after the Commencement Date, Lessor will manage all Lessor Agreements. From and after the Commencement Date, Lessee will manage all agreements, other than Lessor Agreements, applicable to the Leased Premises (hereinafter referred as "Lessee Agreements"). Lessee shall document all of such Lessee Agreements using standardized forms prepared and approved by Lessor in accordance with Lessor's policies concerning hazardous materials storage and handling and engineering standards. Lessee shall not execute or deliver any Lessee Agreement, including any renewal, termination or cancellation thereof, which deviates from Lessor's

standard forms, engineering standards or operating instructions without first receiving the written concurrence of Lessor. Lessor's concurrence or non-concurrence (as the case may be) shall be delivered to Lessee within thirty (30) days of Lessee's written request therefore.

All preparation fees and all expenses billed by Lessor applicable to the Lessor Agreements shall be retained by Lessor. All preparation fees and expenses billed by Lessee applicable to the Lessee Agreements shall be retained by Lessee.

SECTION 14.04 - Lessee shall not execute any Lessee Agreements affecting the Leased Premises having a term extending beyond the initial term of this Lease (or beyond any given extended term which may be in effect at the time of execution) without securing Lessor's express written consent.

Cancellation of any Lessee Agreement for any reason during the term of this Lease must be approved, in advance and in writing, by Lessor. This approval or non-approval (as the case may be) shall be forwarded to Lessee within thirty (30) days of Lessee's request therefore.

SECTION 14.05 - Lessee shall carefully supervise the use of the Leased Premises by any third party to ensure that the value of the Leased Premises is not diminished by reason of such use. In particular, Lessee shall ensure that (i) all uses of the Leased Premises are pursuant to appropriate documentation and that all unauthorized use is either covered by agreement or promptly removed from the Leased Premises; (ii) no use is permitted which could jeopardize the value of the Leased Premises and that Lessee Agreements for storage or handling of hazardous materials are

strictly in conformity with Lessor's policies; and (iii) upon the termination of any Lessee Agreement for any reason whatsoever, the Leased Premises are cleared and restored as required by the terms of the Lessee Agreements. In addition, if the unauthorized use is of a type which would be covered by a Lessor Agreement, Lessee shall promptly bring the unauthorized use to Lessor's attention.

SECTION 14.06 - Lessor reserves the exclusive right to grant easements or other occupations by coal slurry pipelines, or fiber optic or other communication systems or signboards. Any requests for such permits or easements shall be referred to Lessor for appropriate action. Lessor will give at least thirty (30) days notice to Lessee prior to initiation of any easements or other occupations pursuant to this Section. Revenues from the granting by Lessor of those agreements shall accrue solely to Lessor.

SECTION 14.07 - As soon as reasonably practicable after the Commencement Date, Lessor shall assign to Lessee all Lessee Agreements affecting the Leased Premises and Lessee shall assume Lessor's duties and obligations thereunder.

SECTION XV **TERMINATION**

SECTION 15.01 -- This Lease may be terminated as follows:

(a) By Lessee or Lessor:

1. on or at any time prior to the Commencement Date if any substantive condition unacceptable to Lessee or to Lessor is imposed in the regulatory approvals or exemptions contemplated by Section V of this Lease for Lessee's lease and operation of the Leased Premises;

2. upon the occurrence of an Event of Default as provided in Section XIX;
3. upon thirty (30) days' notice to Lessee, as a consequence of an uninterrupted abandonment or discontinuance of operations, as the case may be, for six (6) months by Lessee over any line segment of the Leased Premises (other than an inconsequential abandonment or discontinuance not affecting rail service generally over the Line) other than by reason of an event of force majeure, a lawful embargo, or changes in the demand for service; or
4. upon thirty (30) days' notice to Lessor, following Lessee's obtaining all necessary regulatory approvals or exemptions to permit Lessee to abandon or discontinue rail operations;

(b) By Lessor if Lessee fails to provide a core service of six (6) days per week to customers located between and including Diaz Junction and Guion, Arkansas, PROVIDED, HOWEVER, that Lessee shall have this obligation only if (i) volume on the Diaz Junction-Guion line (excluding unit coal trains) in any three (3) month period is at least eighty percent (80%) of the 1991 volume divided by 4 and (ii) such core service of six (6) days per week was requested by any customer located adjacent to the Diaz Junction-Guion line and Lessee failed to provide such service.

Lessee's failure to maintain six (6) day per week service on the Diaz Junction-Guion portion of the Leased Premises will subject Lessee to being placed on probationary status by Lessor

pursuant to written notice from Lessor, for a period of two (2) months commencing no earlier than two (2) weeks after the date of the notice from Lessor. If Lessee fails to both restore six (6) day per week service by the time of commencement of the probationary period and maintain such service throughout the probationary period, Lessor, at its option, may terminate Lessee's lease of the Diaz Junction-Guion portion of the Leased Premises effective on or after three (3) months' written notice to Lessee and Lessor then may again begin operation over the Diaz Junction-Guion portion of the Leased Premises. Lessee agrees to permit Lessor's immediate operation over the Diaz Junction-Guion portion of the Leased Premises at no charge to Lessor to permit Lessor's service to customers during the period between the date of Lessor's written notice of termination of the Lease and the date of Lessor's actual repossession of the Diaz Junction-Guion portion of the Leased Premises. Lessor shall not exercise its rights hereunder if Lessor agrees with Lessee that Lessee's failure to provide six (6) day per week service was due to a bona fide force majeure condition resulting from Acts of God, war, insurrection or any like cause beyond Lessee's control. The provisions of this Section shall not apply to Lessee's operation over Lessor's Pfeiffer Spur, and Lessee shall not be required to provide six (6) day per week service over the Pfeiffer Spur.

(c) By Lessor pursuant to Section XIX.

(d) By Lessee in the event Lessor is no longer able to interchange traffic with the Lessee at Kansas City, MO or Newport, AR, or at an alternate location satisfactory to both Lessee and Lessor.

(e) In the event that within 365 days after Commencement Date (i) any of Lessor's labor organizations cause a work stoppage as a result of this Lease and Lessor is unable to negotiate a satisfactory resolution with the organization or (ii) conditions unacceptable to Lessor are imposed by the Interstate Commerce Commission or a court or other body, Lessor shall have the right, anytime within such 365 day period, to terminate this Lease by giving thirty (30) days' written notice to Lessee. In such event Lessee shall deliver possession of the Leased Premises to Lessor on such 30th day, subject to all necessary prior regulatory approvals or exemptions, and Lessee shall comply with the provisions of Section XV within such thirty (30) day period. In the event Lessor exercises this right of termination, it will pay Lessee a sum equal to the total of the Verified Costs incurred by Lessee in commencement of operations on the Line, subject to a maximum of \$250,000. "Verified Costs" shall mean costs incurred in purchases of tangibles such as, but not limited to, capital improvements, computers and office and real property, title to which shall pass to Lessor in the event of a termination as provided for hereunder. Thereafter, Lessor will give Lessee the right of first refusal to lease the Leased Premises, exercisable within one year following Lessor's notice to Lessee, on the same terms as set forth in this Lease, provided the conditions which caused termination pursuant to this Section 15.01(d) have, in Lessor's sole opinion, been remedied.

(f) By Lessor or Lessee, by giving 30 days' written notice to the other party, in the event a court or other body determines that

all or any of the provisions of Section IV are unlawful or otherwise unenforceable.

SECTION 15.02 -- In the event of termination as provided in Section 15.01 above, future rental shall be abated as of the date Lessee ceases operation and no equity in title shall be deemed to have been accumulated by Lessee except as provided in Section 8.03. Lessee shall be liable for, and pay to Lessor, all rent accruing prior to the date of such termination.

SECTION 15.03 -- In the event this Lease is terminated, Lessee shall cooperate with Lessor and/or its designee in obtaining operating rights equivalent to those enjoyed by Lessee. Lessee shall assign all Lessee agreements affecting the Leased Premises to Lessor.

SECTION 15.04 -- In the event of termination of this Lease, Lessee shall vacate the Leased Premises in an orderly manner. Upon any termination resulting from an Event of Default by Lessee, Lessor or its designee may immediately re-enter and take possession of the Leased Premises by providing written notice to Lessee that this Lease has been terminated. Upon any termination resulting from an Event of Default, Lessor may immediately assign this Lease to a new lessee and that lessee may immediately begin operation over the Leased Premises pursuant to the terms of this Lease. Lessor or its designee at Lessor's discretion may immediately begin operation over the Leased Premises if Lessee ceases operation on the Leased Premises.

SECTION 15.05 -- Upon any termination of this Lease, Lessee agrees to make available for sixty (60) days thereafter, without charge, any improvements thereon which it may own or hold under

lease (pursuant to Section 8.03 or otherwise) to Lessor or its designee for use in rail freight service. For an additional period of sixty (60) days, Lessor or its designee may purchase such improvements at market value less Lessee's cost of removal; PROVIDED, HOWEVER, that if Lessee receives and is willing to accept a bona fide offer to purchase any such improvement(s), Lessee shall notify Lessor and Lessor shall have the right to purchase the said improvement for the same price offered to Lessee within fifteen (15) days of Lessor's receipt of such notice.

SECTION 15.06 -- Within thirty (30) days of receipt by Lessee of Lessor's notice of termination, or Lessee's notice to Lessor of termination, as provided for above, Lessee shall file any and all required applications or filings with the ICC or other body requesting and securing authority to abandon and cease operations over the Leased Premises. In the event Lessee fails, refuses or neglects to take such action or fails to diligently pursue same to conclusion, Lessee agrees to pay to Lessor, as liquidated damages, the sum of \$1 million per month for each month during the first year or portion thereof following such failure, refusal or neglect; \$2 million per month during the second such year; \$5 million per month during the third such year; and \$10 million for every month thereafter. In the event of termination of this Agreement, Lessee shall assign all agreements affecting the Leased Premises to Lessor.

If Lessor terminates this Lease as a result of the imposition by the ICC of any conditions or restrictions which will result in expenses, losses or damages to Lessor, Lessee may agree, in lieu of termination, and upon consent of Lessor, which consent

shall not be unreasonably withheld, to indemnify, reimburse and hold Lessor harmless from and against all such expenses, costs and damages for the duration of this Lease.

SECTION XVI
COMPLIANCE WITH LAW

SECTION 16.01 -- Lessee agrees to comply with all provisions of law, and Lessee will not knowingly do, or permit to be done, upon or about the Leased Premises, anything forbidden by law or ordinances. Lessee further agrees to use its best efforts to secure all necessary governmental authority for its operation on the Leased Premises.

SECTION XVII
FORCE MAJEURE

SECTION 17.01 -- Lessee shall have no obligation to operate over any portion of the Leased Premises as to which it is prevented from operating by Acts of God, public authority, strikes, riots, labor disputes, or any cause beyond its control; PROVIDED, HOWEVER, Lessee shall use its best efforts to take whatever action is necessary or appropriate to be able to resume its operations. In the event of damage or destruction caused by an Act of God, Lessee shall commence repairs within 10 days of the occurrence causing same and shall pursue such repairs with reasonable diligence.

SECTION 17.02 -- In the event the cost of such repairs are such that Lessee will be unable to recover or recoup such costs within a reasonable period of time, not less than seven (7) years, following completion of the repairs, Lessee may, upon verification of the foregoing, seek relief from Lessor and request that Lessor permit it to abandon the affected segment of the line in question. In the event Lessor determines that Lessee will not in fact be able

to recoup its repair costs, Lessor shall grant permission to Lessee to seek abandonment from the ICC. In the event the ICC approves such abandonment, this Lease shall be amended to delete the segment in question from this Lease, but rental shall remain the same.

SECTION XVIII
DEFEASANCE

SECTION 18.01 -- Lessee shall not make any use of the Leased Premises inconsistent with Lessor's right, title and interest therein and which may cause the right to use and occupy the Leased Premises to revert to any party other than Lessor or Railroad. So long as the Leased Premises are sufficient to permit Lessee to operate between the termini described in Section I, this Lease shall not be affected by any determination, whether by judicial order, decree or otherwise, that ownership of any portion of the Leased Premises is vested in a person other than Lessor or Lessee, and there shall be no abatement of rent on account of such determination. Lessor and Lessee shall make all reasonable efforts to defend Lessor's title to the Leased Premises against any adverse claims.

SECTION XIX
EVENTS OF DEFAULT

SECTION 19.01 -- The following shall be Events of Default:

(a) Failure by Lessee to make payments of rent or other amounts due and payable for any reason arising in connection with this Lease or Lessee's operation over the Leased Premises, and such failure continues for ten (10) days following written demand therefor.

(b) Filing of petition for bankruptcy, reorganization or arrangement of Lessee by Lessee pursuant to the Bankruptcy Reform

Act or any similar proceeding, which petition is not dismissed within thirty (30) days.

(c) Lessee breaches any provision of this Lease other than for the payment of rent which is subject to subparagraph (a) above, and fails to cure such breach within thirty (30) days after receipt of written notice of such breach from the Lessor or fails to commence to cure such default within thirty (30) days, or, once commenced, fails to use due diligence to complete the cure.

(d) The filing of any involuntary bankruptcy, receivership or arrangement proceeding, which filing is not dismissed within 120 days.

SECTION XX **BREACHES; REMEDIES**

SECTION 20.01 -- Upon the occurrence of any breach of any term hereof the injured party shall notify the breaching party in writing and specify the breach and what corrective action is desired to cure the breach. If, upon the expiration of forty-five (45) days from the receipt of said notice, the breach has not been cured (or, if such breach cannot be cured within 45 days, steps have not been taken to effect such cure and pursued with all due diligence within said period) and is a material breach, the injured party shall have the right, at its sole option, to cure the breach if possible and be reimbursed by the breaching party for the cost thereof, including any and all reasonable attorney's fees, and for any reasonably foreseeable consequential damages. Nothing herein shall prevent the injured party from resorting to any other remedy permitted under this Lease or at law or equity, including seeking damages and/or specific performance, as shall be necessary or

appropriate to make the injured party whole in the premises. Failure of the injured party to demand or enforce a cure for breach in one instance shall not be deemed a waiver of its right to do so for any subsequent breach by the breaching party.

SECTION 20.02 -- The failure of any party hereto to enforce at any time any of the provisions of this Lease or to exercise any right or option which is herein provided shall in no way be construed to be a waiver of such provision(s) as to the future, nor in any way to affect the validity of this Lease or any part hereof or the right of either party to thereafter enforce each and every such provision and to exercise any such right or option. No waiver of any breach of this Lease shall be held to be a waiver of any other or subsequent breach.

SECTION XXI **ARBITRATION**

SECTION 21.01 -- If at any time a question or controversy shall arise between the parties hereto in connection with this Lease upon which the parties cannot agree, (other than questions or controversies arising under Sections XIX or XX which shall not be subject to arbitration), and if the parties agree to arbitration, such question or controversy shall be submitted to and settled by a single competent and disinterested arbitrator if the parties to the dispute are able to agree upon such single arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party. If the parties cannot so agree, the party demanding such arbitration (the demanding party) shall notify the other party (the noticed party) in writing of such demand, stating the question or questions to be submitted for

decision and nominating one arbitrator. Within twenty (20) days after receipt of said notice, the noticed party shall appoint an arbitrator, notify the demanding party in writing of such appointment, and at its option submit a counter-statement of question(s). Should the noticed party fail within twenty (20) days after receipt of such notice to name its arbitrator, the arbitrator for the demanding party shall select one for the noticed party so failing. The arbitrators so chosen shall select one additional arbitrator to complete the board. If they fail to agree upon an additional arbitrator, the same shall, upon application of any party, be appointed by the Chief Judge (or acting Chief Judge) of the United States District Court for the District of Missouri upon application by any party after ten (10) days' written notice to the other party.

Upon selection of the arbitrator(s), said arbitrator(s) shall with reasonable diligence determine the questions as disclosed in the parties' statements, shall give all parties reasonable notice of the time and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument, may take such evidence as they deem reasonable or as either party may submit with witnesses required to be sworn, and may hear arguments of counsel or others. If any arbitrator declines or fails to act, the party (or parties in the case of a single arbitrator) by whom he was chosen or said judge shall appoint another to act in his place. After considering all evidence, testimony and arguments, said single arbitrator or the majority of said board of arbitrators shall promptly state such decision or award in writing which shall be final, binding and conclusive on all parties to the arbitration

when delivered to them. Until the arbitrator(s) shall issue the first decision or award upon any question submitted for arbitration, performance under the Lease shall continue in the manner and form existing prior to the rise of such question. After delivery of said first decision or award, each party shall forthwith comply with said first decision or award immediately after receiving it.

SECTION 21.02 -- Each party to the arbitration shall pay the compensation, costs and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses, exhibits and counsel. The compensation, cost and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid in equal shares by all parties to the arbitration.

The non-privileged books and papers of all parties, as far as they relate to any matter submitted for arbitration, shall be open to the examination of the other parties and the arbitrator(s).

SECTION XXII
DIVISIONS, EQUIPMENT,
COMMERCIAL SUPPORT, AAR AGREEMENTS

SECTION 22.01 -- For the term of this Lease, Lessor will pay Lessee revenue divisions per loaded car on traffic originating or terminating on the Leased Premises and interchanged cars as provided in Exhibit E attached hereto and incorporated by reference herein, which divisions shall be subject to any RCAF increases or decreases as shown on Exhibit E. Such increases or decreases will be calculated annually and only one adjustment to the divisions shown in Exhibit E will be made and applied as of December 31st, to be applicable to the following calendar year.

SECTION 22.02 -- For the term of this Lease, Lessor agrees to provide the equipment and commercial support as provided for in Exhibit F.

SECTION 22.03 -- For the term of this Lease, Lessee agrees to comply with and be legally bound by the terms and provisions of the Association of American Railroads' practices, rules, agreements, and circulars such as OT-55, claim handling, as they apply to lading and equipment damage occurring while in Lessee's possession.

SECTION XXIII
MISCELLANEOUS

SECTION 23.01 -- Entire Agreement. This Lease expresses the entire agreement between the parties and supersedes all prior oral or written agreements, commitments, or understandings with respect to the matters provided for herein, and no modification of this Lease shall be binding upon the party affected unless set forth in writing and duly executed by the affected party.

SECTION 23.02 -- Notices. All notices, demands, requests or other communications which may be or are required to be given, served or sent by any party to the other pursuant to this Lease shall be in writing and shall be deemed to have been properly given or sent:

(a) If intended for Lessor, by mailing by registered or certified mail, return receipt requested, with postage prepaid, addressed to Lessor at:

Union Pacific Railroad Company
Missouri Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
Attention: Senior Director Interline Marketing

(b) If intended for Lessee, by mailing by registered or certified mail, return receipt requested, with postage prepaid, addressed to Lessee at:

Missouri & Northern Arkansas Railroad Company, Inc.
514 North Orner
Carthage, MO 64836
Attention: General Manager

SECTION 23.03 -- Each notice, demand, request or communication which shall be mailed by registered or certified mail to any party in the manner aforesaid shall be deemed sufficiently given, served or sent for all purposes at the time such notice, demand, request or communication shall be either received by the addressee or refused by the addressee upon presentation. Any party may change the name of the recipient of any notice, or his or her address, at any time by complying with the foregoing procedure.

SECTION 23.04 -- Binding Effect. This Lease shall be binding upon and inure to the benefit of Lessor and Lessee, and shall be binding upon the successors and assigns of Lessee, subject to the limitations hereinafter set forth. Lessee may not assign its rights under this Lease or any interest therein, or attempt to have any other person assume its obligations under this Lease, without the prior written consent of Lessor, which consent shall not unreasonably be withheld; PROVIDED, HOWEVER, in the event Lessee elects to assign its interest in the Leased Premises, and Lessor consents to this assignment, Lessee will first secure the approval of the Interstate Commerce Commission, and/or, such other regulatory approvals as may be then required; and PROVIDED FURTHER, that Lessor has approved the financial condition and operational ability of the new Lessee, which approval will not be unreasonably

withheld and which evaluation of the new Lessee will be consistent with then existing practices in the industry.

SECTION 23.05 -- Severability. If fulfillment of any provision hereof or any transaction related hereto shall involve transcending the limit of validity prescribed by law, then the obligation to be fulfilled shall be reduced to the limit of such validity; and if any clause or provision herein contained operates or would prospectively operate to invalidate this Lease in whole or in part, then such clause or provision only shall be held ineffective, as though not herein contained, and the remainder of this Lease shall remain operative and in full force and effect.

SECTION 23.06 -- Headings. Article headings used in this Lease are inserted for convenience of reference only and shall not be deemed to be a part of this Lease for any purpose.

SECTION 23.07 -- Governing Law. This Lease shall be governed and construed in accordance with the laws of the State of Missouri. It is expressly agreed that no party may sue or commence any litigation against the other party unless such legal proceeding is brought in Federal court in Missouri. Lessee's operations under this Lease shall also comply with the applicable provisions of Federal law and the applicable rules, regulations and policies of any agency thereof.

SECTION 23.08 -- Amendment. No modification, addition or amendments to this Lease or any of the Appendices shall be effective unless and until such modification, addition or amendment is in writing and signed by the parties.

SECTION 23.09 -- Counterparts. This Lease may be executed in any number of counterparts, each of which shall be deemed to be an

original and all of which together shall be deemed to be one and the same instrument.

SECTION 23.10 -- Confidentiality. No party may disclose any of the terms of this Lease Agreement to any non-party without the prior written consent of the other party except (1) as required by law; (2) to a corporate parent, subsidiary or affiliate; or (3) to auditors retained by a party for the purpose of assessing the accuracy of charges, if, and only if, the auditor agrees in a legally binding instrument that it will abide by this confidentiality clause as if auditor were a party to this Lease Agreement. Each party agrees to indemnify the other from and against any damage suffered by a party as a result of any disclosure in violation of this confidentiality provision.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed on their behalf, as of the date first herein written.

MISSOURI PACIFIC RAILROAD COMPANY,

By *R.B. Schaub*
Title: Executive Vice President - Operations

MISSOURI & NORTHERN ARKANSAS
RAILROAD COMPANY, INC.

By *D.T. McShane*
Title: VICE PRESIDENT

LIVEFURNALERS.JDA

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REDACTED

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Missouri & Northern Arkansas (MNA)

